

LAND USE CONTROLS

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References

- OSWER Dir. 9355.0-30, Role of Baseline Risk Assessment in SUPERFUND Remedy Selection Decisions (22 APR 99)
- OSWER Dir. 9355.7-04, Land Use in the CERCLA Remedy Selection Process (25 May 95)
- GSA Memo, Restrictive Covenants on Non-Excess Property (16 OCT 98)
- ACSIM Memo, Army Guidance on using Institutional Controls (Ics) in the CERCLA Process (4 SEP 98)

Definitions

- Land Use Control (LUC)
 - Generic term for any restriction on the use of real property -- in the CERCLA context LUCs are Institutional Controls (ICs) + Engineering Controls (ECs)

Definitions

- Institutional Control (IC)
 - In the CERCLA context, the legal mechanism incorporated into a remedy to ensure that land use does not change or that are ECs are altered

Definitions

- Engineering Control (EC)
 - In the CERCLA context, the physical mechanism used to implement a remedy

Legal Framework

- Statutory Drivers
 - CERCLA is in the major driver
 - RCRA?
- CERCLA baseline risk assessment
 - Carcinogenic risk
 - Non-carcinogenic risk
 - Risk based ARARS
 - ICs do not = risk reduction

Legal Framework

- Major factor in risk assessment -- LAND USE
 - “[T]he assumption of future residential land use may not be justifiable if the probability that the site will support residential use in the future is small.” 55 Fed. Reg. at 8710
 - Major exception -- groundwater

Legal Framework

- Future land use prognosticators
 - Current uses
 - Surrounding Uses
 - Zoning
 - Environmental Justice issues
 - Environmentally sensitive areas (e.g., wetlands, ESA critical habitat)

Legal Framework

- LUC or IC?
- Types of ICs
 - Land use planning (e.g., zoning)
 - Property law

Legal Framework

- Major IC considerations
 - Effectiveness
 - Permanence
 - Type of installation (active, excess and BRAC)
 - GSA Memo
 - Role of regulators
 - Selecting
 - Enforcement

Current Policy

- Army policy
 - IC for risk = CERCLA remedy
 - High degree of certainty (mandated use) IC
 - Document with NFA DD or ROD
 - Capture in FOST/FOSTL/ Installation Master Plan
 - Consider cleaning to unrestricted use as an alternative to NFA or IC
 - Include IC maintenance in cost estimates

The Future?

- Near Term
 - Fort McClelland
- DOD Guidance
 - Active installations
 - BRAC/Excess installations
- State law trends
- Army organizational issues